

8-2400-9166-6

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY

Arbuckle's Bar & Grill, Inc.,

v.

Minnesota Department of Public Safety.

FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 1:30 p.m. on November 15, 1994, at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to an Order for Hearing and Notice Thereof dated October 11, 1994. The record closed at the conclusion of the hearing on November 15.

Jeffrey F. Lebowski, Assistant Attorney General, 500 Capitol Office Building, 525 Park Street, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Public Safety (Department). Dale A. Sweno, Arbuckle's Bar & Grill, Inc., 374 St. Peter Street, St. Paul, Minnesota 55103, appeared on behalf of Arbuckle's Bar & Grill, Inc. (Respondent).

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Public Safety will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Fredrick C. Petersen, Director, Minnesota Department of Public Safety, Liquor Control Division, 190 Fifth Street East, St. Paul,

Minnesota 55101, to ascertain the procedure for filing exceptions or present argument.

STATEMENT OF ISSUE

The issues in this case are whether the Respondent purchased alcoholic beverages from a retail licensee for the purpose of resale in violation of Minn. Stat. § 340A.415 (1993 Supp.); and if so, whether an administrative penalty should be imposed upon Respondent.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Arbuckle's Bar & Grill, Inc. is a Minnesota corporation doing business at 374 St. Peter Street in St. Paul, Minnesota. It has an on-sale retail liquor license for its business from the City of St. Paul. Dale Swer is one of the Respondent's four shareholders. He operates the St. Paul business.

2. Respondent purchased the business about 6 years ago. Since that time, it has experienced financial problems and has incurred delinquent sales tax liabilities.

3. On April 15, 1994 the Respondent was included on the Minnesota Department of Revenue's list of taxpayers owing delinquent sales taxes.

4. On receipt of the Revenue Department's list of delinquent taxpayers the Commissioner of Public Safety must post the list. The third day after posting, no wholesaler, manufacturer, or brewer may sell or deliver any product to a taxpayer on the posted list. Minn. Stat. § 270.73 (1992).

5. On April 15, 1994, Respondent was on the list of taxpayers posted to the Commissioner of Public Safety. Respondent's name remained on the posted list until August 8, 1994.

6. Thomas A. Leigh is special investigator for the Minnesota Department of Public Safety, Liquor Control Division. He was aware that Respondent's name was on the list of delinquent taxpayers posted by the Commissioner of Public Safety. On July 26, 1994, Leigh visited Respondent's business premises in St. Paul for the purpose of determining, among other things, if Respondent was purchasing alcoholic beverages for resale in violation of Minn. Stat. § 340A.415 (1992).

7. At the time of his inspection, Leigh examined Respondent's inventory of alcoholic beverages. He discovered Respondent had possession of beer which had been canned subsequent to Respondent's placement on the liquor posting list. Leigh also found retail price sticker residues on bottles of distilled spirits. Respondent had purchased alcoholic beverages (beer) for resale after April 19, 1994 and before its name was removed from the list on August 8, 1994. Respondent hadn't purchased any "hard liquor", however. Although some bottles of distilled spirits in Respondent's possession had "price sticker residue", those bottles had been purchased from a distributor prior to posting. They had been returned to the distributor by an off-sale retailer who went out of business.

8. On August 9, 1994, Lance Bolter, Assistant Director of the Liquor Control Division, of the Department of Public Safety, issued a Notice of Agency Action, charging that Respondent purchased intoxicating liquor from a retail liquor licensee for the purpose of resale in violation of Minn. Stat. § 340A.415. In the Notice of Agency Action, a \$400 civil fine was imposed upon Respondent. Respondent requested a contested case hearing within the 20-day period authorized by statute, and this hearing followed.

9. On February 17, 1994, Sweno wrote to the Commissioner of Revenue. In his letter, Sweno noted Respondent's cash flow problems and the tax delinquencies it had experienced since it first began operations. He requested that the Revenue Department enter into a payment agreement with Respondent covering its tax delinquencies. Sweno attached to his letter a newspaper article regarding "Mississippi Live". Mississippi Live's name was apparently not included on the list of delinquent taxpayers sent to the Commissioner of Public Safety when it had tax delinquencies of approximately \$183,000. The article described the delinquencies and the payment agreement allegedly made by the Commissioner of Revenue and the owners of Mississippi Live. Ex. A.

10. On March 2, 1994, a Revenue officer for the Department of Revenue responded to Sweno's letter. The Revenue officer refused to discuss the Mississippi Live case and went on to state that Respondent's name could not be removed from the posting list until all delinquent taxes were paid. Ex. B. The Revenue Department reiterated its position in a letter dated March 21, 1994. In that letter, a Revenue Department supervisor stated that even if a payment plan acceptable to the Commissioner was negotiated with Respondent, Respondent's name would still have to be included on the list of delinquent taxpayers sent to the Commissioner of Public Safety.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of the Minnesota Department of Public Safety and the Administrative Law Judge have authority to review the propriety of the Department's administrative penalty order under Minn. Stat. §§ 340A.415 and 14.50 (1992).

2. The Respondent received proper and timely notice of the hearing and of the charges against it.

3. The Department has complied with all relevant substantive and procedural requirements of statute and rule.

4. Under Minn. Rules, pt. 1400.7300, subp. 5 (1993), the Department has the burden of proof to establish by a preponderance of the evidence that Respondent purchased alcoholic beverages from another retail licensee for the purpose of resale.

5. Under Minn. Stat. § 340A.101, subd. 2 (1992), any beverage containing more than one half of one percent alcohol by volume is an alcoholic beverage.

6. Under Minn. Stat. § 340A.101, subd. 14, intoxicating liquors include malt beverages containing more than 3.2 percent of alcohol by weight.

7. The beer Respondent purchased at retail for the purpose of resale is an "alcoholic beverage" and an "intoxicating liquor" for purposes of Minn. Stat. § 340A.101, subds. 2 and 14 (1992).

8. The Department established, by a preponderance of the evidence, that Respondent purchased alcoholic beverages from another retail licensee for the purpose of resale in violation of Minn. Stat. § 340A.415 (1992).

9. The Respondent's violation of Minn. Stat. § 340A.415 is not excused on the grounds that the Minnesota Department of Revenue refused to enter into a payment agreement with the Respondent for delinquent taxes or exclude Respondent from the Revenue Department's list of delinquent taxpayers.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of the Minnesota Department of Public Safety affirm the Findings in the Notice of Agency Action issued by the Assistant Director of the Liquor Control Commission on August 19, 1994, and assess an administrative penalty not exceeding \$400.

Dated this ____ day of December, 1994.

JON L. LUNDE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Taped, one tape

MEMORANDUM

On April 15, 1994, the Respondent was placed on a posting by the Commissioner of the Minnesota Department of Revenue pursuant to the provisions of Minn. Stat. § 270.73 (1992). The statute states:

Subdivision 1. Posting. Pursuant to the authority to disclose under section 270B.12, subdivision 4, the commissioner shall, by the 15th of each month, submit to the commissioner of public safety a list of

all taxpayers who are required to withhold or collect the tax imposed by section 290.92 or 297A.02, or local sales and use tax payable to the commissioner of revenue, or a local option tax administratively collected by the commissioner of revenue, and who are 30 days or more delinquent in either filing a tax return or paying the tax.

The commissioner of revenue is under no obligation to list a taxpayer whose business is inactive. At least ten days before notifying the commissioner of public safety, the commissioner of revenue shall notify the taxpayer of the intended action.

The commissioner of public safety shall post the list in the same manner as provided in section 340A.318, subdivision 3. The list will prominently show the date of posting. If a taxpayer previously listed cures the delinquency by filing all returns and paying all taxes, the commissioner shall notify the commission of public safety within two business days that the delinquency was cured.

Subd. 2. Sales Prohibited. Beginning the third business day after the list is posted, no wholesaler, manufacturer or brewer may sell or deliver any product to a taxpayer included on the posted list.

Once a licensee is on the posted list, no manufacturer, wholesaler, or brewer or alcoholic beverages may sell or deliver any product (liquor or beer) to a retail licensee while the licensee remains on the posted list. Minn. Stat. 270.73, subd. 2 (1992). Also, under Minn. Stat. § 340A.415 (1993 Supp.), no retail licensee may purchase alcoholic beverages from another retail licensee for the purpose of resale at any time.

Due to the fact that Respondent's posting on the Commissioner's list was effective on April 19, 1994, Leigh decided that Respondent would likely have few alcoholic beverages it could sell. Consequently, on July 26, Leigh visited the Respondent's premises to make sure that no manufacturers or wholesalers were selling any product to Respondent and that the Respondent was not purchasing alcoholic beverages from another retail licensee for the purpose of resale. During the course of his inspection, Leigh found that Respondent had in possession of at least 12 cases of various brands of beer which were canned after Respondent was placed on the liquor posting list. At the hearing, Swenson admitted that the beer had been purchased from another retail licensee for the purpose of resale. Clearly, therefore, Respondent violated Minn. Stat. § 340A.415 which prohibits such purchases.

At the hearing, Respondent argued that no penalties should be assessed because the Minnesota Department of Revenue refused to enter into a payment plan covering Respondent's delinquent tax obligations to the state and withheld its name from the list of taxpayers sent to the Commissioner of Public Safety even though it had apparently done so in one other case.

Respondent's argument involves the application of Minn. Stat. §§ 270.72 and 270.73. Under Minn. Stat. § 270.72, the Commissioner of Revenue may enter into a payment plan covering delinquent taxes owed by a licensee. If a satisfactory payment plan is executed by the delinquent taxpayer and the Department of Revenue, the Revenue Department does not take any actions which

could lead to revocation of any licenses held by the delinquent taxpayer. However, even if the Commissioner of Revenue had entered into a payment plan with the Respondent, the Department of Revenue was still required to submit name to the Commissioner of Public Safety when Respondent was 30 days delinquent in paying taxes to the Department of Revenue. Therefore, even if the Department of Revenue had entered into a payment plan, Respondent would still have been posted on the Department of Revenue's list and would have been subject to the statutory prohibitions precluding wholesalers and distillers from selling alcoholic beverages to him and prohibiting Respondent from purchasing alcoholic beverages from other retailers for the purpose of resale.

In Respondent's view, his name should not have been included on the list of delinquent taxpayers sent to the Department of Public Safety because the Department of Revenue had allegedly omitted Mississippi Live from the list of delinquent taxpayers sent to the Department of Public Safety. In Respondent's view, his prosecution is, therefore, constitutionally barred on equal protection grounds. That argument must be rejected.

The Equal Protection clause of the 14th Amendment forbids the discriminatory enforcement of nondiscriminatory laws. City of Minneapolis v. Buschette, 240 N.W.2d 500, 502 (Minn. 1976). However, the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation. Oyler v. Boyles, 366 U.S. 448, 456 (1962). This general rule is discussed at 16B C.J.S., Constitutional Law, at § 743, where it states:

The equal protection clause provides a basis for contending that general rules are being applied in an arbitrary or discriminatory way, and selective prosecution, if based on improper motives, can violate equal protection. In other words, equal protection of the laws may be violated by an intentional or purposeful, consistent pattern of discrimination in the enforcement and application of a criminal statute. A heavy burden rests with the accused to establish conscious, intentional discrimination in the application of the law. Specifically, accused must establish that others similarly situated have not generally been prosecuted and that the government's discriminatory selection of him is invidious, arbitrary, or in bad faith, i.e., that his prosecution is based on a constitutionally impermissible consideration such as race, religion, or his exercise of First Amendment rights to free speech or freedom of association.

In this case, Respondent believes that Mississippi Live was deliberately excluded from the list of delinquent taxpayers sent to the Minnesota Department of Public Safety by the Minnesota Department of Revenue. Respondent believes that the omission was made because Mississippi Live was funded, in whole or part, by municipal bonds and it was decided that a default on the bonds should be averted, if possible. Assuming that the Respondent's beliefs are true, its claim of selective prosecution must fail because Respondent didn't establish that its prosecution was based on a constitutionally impermissible factor, such as race or religion, or that the Commissioner of Public Safety or the Commissioner of Revenue have engaged in an intentional or purposeful and consistent pattern of discrimination. Even if the Department of Revenue, in one case, violated Minn. Stat. § 270.73 by withholding Mississippi Live's name from the list of delinquent taxpayers sent to the Commissioner of Public Safety, the Commissioner of Public Safety is not thereby precluded from enforcing the law against all others whose names were included on the list. There is no evidence that the Commissioner of Public Safety has not applied the law equally to all and if, in one instance, the Department of Revenue failed

apply the law as written, Respondent's illegal activity is not, for that reason, excused. Hence, even if there was sufficient evidence in record showing that the Department of Revenue acted improperly in one case, its constitutional arguments must fail.

JLL